No. 88-244

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN D. OLITSKY,

Petitioner,

v.

SPENCER GIFTS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION

LAWRENCE D. LEVIEN, P.C.
(Counsel of Record)
BETTY LEACH
AKIN, GUMP, STRAUSS, HAUER & FELD
1333 New Hampshire Ave., N.W.
Suite 400
Washington, D.C. 20036
(202) 887-4000
Counsel for Respondent Spencer Gifts, Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Did the Fifth Circuit correctly find reversible error in the District Court's admission into evidence of a company official's statement, during the Equal Employment Opportunity Commission conciliation process, evaluating and/or admitting the company's liability on an age discrimination claim?
2. Was the District Court correct in denying plaintiff an award of pre-judgment interest?
3. Was the District Court correct in denying plaintiff double front pay as part of liquidated damages?

STATEMENT OF AFFILIATION

Spencer Gifts, Inc., is a wholly-owned subsidiary of MCA, Inc. Spencer Gifts has neither subsidiaries nor affiliates. This statement is made in compliance with Rule 28.1, Rules of the Supreme Court.

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OPINIONS BELOW

The opinion of the Court of Appeals (Petitioner's Appendix A) is reported at 842 F.2d 123. The decision of the Court of Appeals denying rehearing is found at Petitioner's Appendix B and is not reported. The Opinion of the District Court is found at Petitioner's Appendix C and is not reported.

JURISDICTION

The Court of Appeals entered judgment on April 11, 1988. It denied a petition for Rehearing on May 11,

1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. EEOC Proceedings

Spencer Gifts hired John D. Olitsky, Plaintiff in this age discrimination action, as a merchandise manager in 1981. Mr. Olitsky occupied this position until December 1983, when he was terminated at age 53.

Olitsky filed a timely charge with the Equal Employment Opportunity Commission ("EEOC"). He claimed that his termination was age-motivated, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 626, *et seq.* ("ADEA") (Petitioner's Appendix G). In addition, he charged that Spencer Gifts terminated him to defeat his pension rights, in violation of Employment Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA").

The EEOC conducted the conciliation process mandated by the ADEA. Under these procedures, the Commission, upon receipt of a charge, must "promptly notify all persons named in the charge as prospective defendants in the action, and . . . promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion." 29 U.S.C. § 626(d). EEOC Investigator Janice Johnson kept a file based on her investigation, which contained handwritten notes from interviews with Olitsky and Ronald Mangel, General Counsel for Spencer Gifts. Efforts at conciliation failed, and Olitsky filed suit in the District Court for the Northern District of Texas.

B. The Trial

At trial, the district court judge declined to allow Janice Johnson to testify (Tr. 353), but over Spencer Gifts' objection admitted her report from the conciliation

process (Tr. 4). This file contained Ms. Johnson's notes of a conciliation meeting, which recorded Mr. Mangel allegedly as saying Spencer Gifts "can't rebut if McNally was promoted." *Olitsky v. Spencer Gifts*, 842 F.2d 123, 125 (5th Cir. 1988). McNally was a younger merchandise manager who was promoted after Olitsky was fired. In closing argument, Olitsky's counsel argued forcefully that Mr. Mangel's statement was an admission of age discrimination:

> ". . . on top of that *we have got the smoking gun.* We've got the company's own lawyer faced with the facts back in 1984 and saying to the EEOC if McNally got promoted I can't rebut, I can't do anything about the case."

(Tr. 650). (emphasis added)

The jury found in Olitsky's favor on the ADEA claim and awarded backpay in the amount of $221,021, which it doubled, pursuant to the liquidated damages provision of the ADEA, 29 U.S.C. § 626(b). The court found for Olitsky on the ERISA charge, and awarded $216,824 for lost pension benefits, $363,244 in front pay, and $90,000 in attorney's fees. The judgment totaled $1,112,110, plus post-judgment interest. The district court denied prejudgment interest and refused to double the front pay award.

C. The Fifth Circuit's Reversal

The Fifth Circuit held that admission of the EEOC conciliation file violated Section 706(b) of Title VII, and constituted reversible error. 842 F.2d at 126. Section 706(b), which requires EEOC investigation and conciliation of charges, provides, in pertinent part:

> If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, concilia-

> tion and persuasion. *Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons involved.*

42 U.S.C. § 2000e-5(b) (emphasis added).

The court rejected as "mechanistic" Olitsky's argument that the Section 706(b) confidentiality provision cannot apply in ADEA cases because ADEA procedure does not require the formal finding of "reasonable cause" which precedes commencement of conciliation in Title VII cases. *Id.* at 126-27. It noted that the ADEA permits conciliation to begin "promptly" upon receipt of the charge. The court issued its ruling based upon the salutary purposes of Section 706(b), without having to address the applicability of that provision in ADEA cases.

The court reasoned that admitting evidence of candid self-assessments could vitiate the EEOC conciliation process by discouraging the openness that Congress envisioned. It cited its decision in a Title VII case, *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 880 (5th Cir. 1981), regarding the purpose of Section 706(b):

> The obvious purpose of the statute's prohibition on revealing statements made or actions taken during the Commission's conciliation efforts is to promote the Congressional policy favoring unlitigated resolution of employment discrimination claims. Cooperation and voluntary compliance are the preferred means for the elimination of unlawful employment discrimination and Congress . . . established an informal dispute resolution to accomplish this goal.

It stated, "Mangel's supposed admission of liability to the EEOC investigator in this case is exactly the kind of exchange among the parties and the EEOC that informal conciliation ought to encourage." 842 F.2d at 127. The

court observed that this statement could have had great effect on the jury's verdict:

> The statements by Mangel in the EEOC conciliation file may easily be interpreted as a virtual concession of liability by Spencer Gifts. Indeed, that is exactly what Olitsky's counsel repeatedly suggested to the jury in closing arguments. We are not persuaded that the erroneous introduction of this highly damaging statement had no effect on the jury's verdict.

Id. at 127. Because the court of appeals found the admission of the file constituted reversible error, it did not reach the additional issues of pre-judgment interest and double front pay.

D. The Petition for Certiorari

In his Petition for Certiorari, Olitsky challenges the Fifth Circuit's application of Section 706(b) and/or its underlying rationale in this ADEA case. He apparently contends that the court's ruling would shield *all* materials in an ADEA conciliation file, including facts and statistics of the type normally collected before a finding of reasonable cause in a Title VII case, as well as admissions. Implicit in his argument is that Section 706(b) is designed specifically to preserve a claimant's access to such factual data in Title VII cases by protecting only those conciliation proceedings that occur after a finding of reasonable cause based on the facts in the investigative file. *See* Petition at 13-16. Petitioner apparently contends that, since the ADEA requires no formal finding of reasonable cause whose issuance would trigger the Section 706(b) confidentiality protection, everything in an ADEA conciliation file—admissions and self-assessments, as well as facts and figures—should be available as potential evidence of pretext in a later proceeding. Petitioner even argues that the court's ruling confuses the application of Section 706(b) in Title VII cases by excluding from evidence the conciliation efforts that, as a practical matter,

are often undertaken before the reasonable cause finding. He argues that such a result would be contrary to Section 706(b)'s ostensible purpose of protecting only those conciliation discussions that occur *after* a finding of reasonable cause. *Id.* at 18-19. Finally, Petitioner contends that there is conflict among the circuits on the issues of pre-judgment interest and doubling of front pay awards. *Id.* at 23-25.

ARGUMENT

I. The Fifth Circuit Properly Held That Admission of the Statements Made During EEOC Conciliation Procedures Was Reversible Error

All of Petitioner's arguments that are premised upon Section 706(b)'s application only to conciliation proceedings that *follow* a finding of reasonable cause must be rejected, since courts have never applied such an artificial "before/after" distinction even in Title VII cases. Rather, courts have looked to the nature of the material whose introduction is sought. Where the material reflects admissions or self-assessments like the statement in this case, courts have excluded such statements from later proceedings, without regard to whether they occurred before or after the finding of reasonable cause. In *Tulloss v. Near North Montessori School*, 776 F.2d 150 (7th Cir. 1985) the court affirmed the district court's decision to rule on each item in the EEOC file separately, because it served to exclude

> such potentially prejudicial material as personal statements by the plaintiff, newspaper articles, statements by plaintiff's professional and personal supporters, opinions of the EEOC investigator, and letters relating to settlement negotiations . . .

Id. at 154. The Second Circuit made the same distinction regarding the nature of evidence in *Gillen v. Federal Paper Co.*, 479 F.2d 97 (2d Cir. 1973). In excluding the investigative report, the court found it contained

> a mishmash of self-serving and hearsay statements and records which contain conflicting opinions, comments and inferences drawn by investigators, potential witnesses and unidentified persons. This maze of material would thwart rather than ease the trier's efforts.

Id. at 99.

The Title VII cases cited by Petitioner are distinguishable, and merely illustrate the kinds of *factual* EEOC file materials for which the confidentiality protection of Section 706(b) is not necessary. The evidence admitted in both cases consisted only of statements and records rather than admissions or self-appraising statements. In *Marks v. Prattco*, 607 F.2d 1153 (5th Cir. 1979), the court held that copies of information sheets filled out by the employer in response to a request by the EEOC were properly admitted into evidence as public records. In *Geromette v. General Motors Corp.*, 609 F.2d 1200 (6th Cir. 1979), the court held admissible the employee's sworn affidavit, contained in her charge, which established that her charge was untimely.

While the courts have addressed the confidentiality of conciliation materials only in the context of Title VII, the same policy of ensuring forthrightness in conciliation applies in ADEA cases. Even if Section 706(b) were not directly applicable in such cases,[1] exclusion of such evidence is consistent with Rule 408 of the Federal Rules of Evidence, which provides, in part, that, "[e]vidence of conduct or statements made in compromise negotiations is . . . not admissible." On appeal, Petitioner failed to respond to the Company's assertion that admission of comments made during compromise negotiations violates Rule 408. His failure to address the issue here, once again constitutes a tacit admission that Rule 408 bars this evidence. Thus, the Fifth Circuit's holding has no

[1] A review of the legislative history of the ADEA reveals nothing on the applicability or nonapplicability of Section 706(b).

potential for clouding jurisprudence under either the ADEA or Title VII. Moreover, Investigator Johnson's unverified, out-of-court summaries are clearly hearsay which, because they are Johnson's (not Mangel's) written notations, cannot possibly be used as an admission against Spencer Gifts' interest. Since no other circuits have ruled on the application of Section 706(b) to the ADEA, and since the court's holding is consistent with other applicable law, the Court should decline to consider the issue in the absence of a conflict among the circuits.

II. The District Court Was Correct In Denying Pre-Judgment Interest

Should the Court decline to consider the court of appeals' ruling on the nonadmissability of the conciliation file, it should not consider the additional issue of pre-judgment interest. This case does not present an appropriate opportunity to address this issue, as it will be unclear until retrial whether Petitioner is entitled to damages at all.

Moreover, the District Court's ruling denying pre-judgment interest is consistent with prevailing circuit law. Since this Court's decision in *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985), many of the circuits have begun to include an award of pre-judgment interest in age discrimination cases. While pre-judgment interest is allowable under the ADEA, it is not mandated. The various circuits have held that in ADEA and Title VII cases, an award of pre-judgment interest is within the discretion of the trier of fact. Therefore, while an award of pre-judgment interest can be made in age discrimination cases, denial of interest is just as consistent with prevailing law. "The decision whether to grant equitable relief and, if granted, what form it shall take, lies in the discretion of the district court." *Castle v. Sangamo Wes-*

ton, Inc., 837 F.2d 1550, 1563 (11th Cir. 1988). *See also Domingo v. New England Fish Co.*, 727 F.2d 1429, *modified*, 742 F.2d 520 (9th Cir. 1984); *Heiar v. Crawford County, Wisconsin*, 746 F.2d 1190 (7th Cir. 1984); *Syvock v. Milwaukee Boiler Manufacturing*, 665 F.2d 149 (7th Cir. 1981); *Bunch v. Ballard*, 795 F.2d 384 (5th Cir. 1986); *Earnhardt v. Commonwealth of Puerto Rico*, 744 F.2d 1 (1st Cir. 1984).

Judge Keady did not rule that an award of prejudgment interest was precluded under the ADEA. Instead, he followed prevailing law, stating "I think [prejudgment interest] is in the discretion of the Court. And considering that version of the law that I have I'm going to deny interest on any backpay portion of the claim." (Tr. 694.)

III. The District Court Was Correct In Its Denial Of A Double Front Pay Award

Contrary to Petitioner's assertion, there is no conflict between the wording of the ADEA, the *Thurston* decision and the various circuit decisions with regard to double front pay and pension benefits. The ADEA specifies that only "amounts owing" are to be considered liquidated damages. The *Thurston* decision holds that liquidated damages are punitive in nature. The decision makes no mention of front pay and pension benefits. The circuits that have addressed the issue have held that a front pay (which includes both future wages and pension benefits) award is the monetary equivalent of the equitable remedy of reinstatement. They have therefore declined to extend the liquidated damages provision of the ADEA to double this equitable award. *See Blum v. Witco*, 829 F.2d 367 (3d Cir. 1987); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988); *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249 (2d Cir. 1987); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1348 (9th Cir. 1987); *Bhaya v. Westinghouse Electric Corp.*, 624 F. Supp. 921, 924 (E.D. Pa. 1985).

Finally, as with pre-judgment interest, this is not an appropriate case for this Court's consideration of the issue of double front pay. It is unclear, pending retrial, whether Petitioner is entitled to damages at all.

CONCLUSION

For the foregoing reasons, Spencer Gifts, Inc. respectfully requests that this Court deny the Petition for Certiorari.

Respectfully submitted,

LAWRENCE D. LEVIEN, P.C.
(Counsel of Record)
BETTY LEACH
AKIN, GUMP, STRAUSS, HAUER
& FELD
1333 New Hampshire Ave., N.W.
Suite 400
Washington, D.C. 20036
(202) 887-4000
Counsel for Respondent
Spencer Gifts, Inc.